PHUA TECK MAI v. SENG AH TAU

[D.C.A. (Chua J.) February 18, 1983]

[Singapore – District Court Appeal No. 46 of 1981]

Landlord & Tenant – Rent-controlled premises – Claim for possession – Whether purported licence agreement was in fact tenancy agreement – Control of Rent Act (Cap 266).

Landlord & Tenant – Rent-controlled premises – Excess rent received – Control of Rent Act (Cap. 266), s. 3(4).

The plaintiff claimed possession of a rent-controlled premises on the ground that the licence for the said premises granted to the defendant by an agreement in writing dated May 2, 1979 had been determined by the plaintiff. The defendant claimed protection under the Control of Rent Act. He contended that the said agreement was only a purported licence agreement and that in fact it was a tenancy agreement whereby the said premises were let to him. The defendant counterclaimed against the plaintiff the sum of $34,968.12 being excess rent under section 3(4) of the said Act.

The only issue before the District Court was whether the purported licence agreement was in fact a tenancy agreement. The learned Trial Judge held that the said agreement was a tenancy agreement and dismissed the plaintiff's claim with costs. The defendant's counterclaim was allowed and he was awarded $26,424.40 and costs.

The plaintiff appealed and argued: (1) that the trial judge erred in holding that oral evidence was admissible to vary the written contract between the parties, and

(2) that the learned trial judge erred in holding that the said agreement created a tenancy and not a licence.

Held, dismissing the plaintiff's appeal: (1) the learned trial judge did not err. As the plaintiff chose not to give any evidence at the trial and relied solely on the purported licence agreement, the learned judge had only the undisputed evidence of the plaintiff;

(2) the learned trial judge had applied the correct law and had come to the right conclusion that it was a tenancy agreement and that the plaintiff had used the device of a licence agreement to put the label of licence on it.

Cases referred to:

(1) *Seow Kim Koi* v. *Wei Yin Chen* [1968] 2 M.L.J. 193.

(2) *Facchini* v. *Bryson* (1952) 1 T.L.R. 1386 @ p. 1389 & 1390.

DISTRICT COURT APPEAL.

J.B. Jeyaretnam for the appellant.

Giam Chin Toon for the respondent.

Cur. Adv. Vult.

Chua J.: This is an appeal against the judgment of the District Court dismissing the claim of the appellant (plaintiff) against the respondent (defendant) for the possession of premises known as No. 280, East Coast Road, Singapore (the said premises).

The plaintiff claimed possession of the said premises on the ground that the licence for the said premises granted to the defendant by an agreement in writing dated May 2, 1979, had been determined by the plaintiff (the said agreement).

In his Defence the defendant contended that the said premises were premises to which the Control of Rent Act (Cap. 266)(the Act) applied and that he was entitled to protection thereof. The defendant contended that the said agreement was only a purported licence agreement and that in fact it was a tenancy agreement whereby the said premises were let to him. The defendant counterclaimed against the plaintiff the sum of $34,968.12 being excess rent under section 3(4) of the Act.

The only issue for the District Court to determine was whether the purported licence agreement was in fact a tenancy agreement. The plaintiff did not call any witness in support of his claim and relied solely on the said agreement.

It was submitted by counsel for the plaintiff that no evidence whatsoever ought to be received by the court to vary or contradict the terms of the written agreement except the written agreement itself and that the court should not receive any evidence of the defendant if it contradicted the terms of the said agreement. The trial judge ruled that the defendant could give oral evidence.

The defendant gave evidence to the effect that sometime in April, 1973, he met the plaintiff. He then agreed with the plaintiff that he would rent the whole of the said premises (which consist of a shophouse downstairs and a residence upstairs) at $550 p.m. but that the receipt issued to him would only state $400. It was also agreed that the term would be six years from April 1, 1973, to March 31, 1979. He was then asked to sign an agreement in the plaintiff's solicitors' office dated April 27, 1973. He also made a statutory declaration in the High Court declaring that the letting was a licence only, at the request of the plaintiff.

According to the defendant he did not understand English and did not know the difference between a tenancy and a licence. That as far as he was concerned he rented the said premises for six years at $550 p.m.

In the shophouse he carried on business of a tailor shop whilst he and his family and servant resided upstairs. The keys to the front door and back door of the said premises were always kept by him and were never in the possession of the plaintiff.

After the agreement was signed by him, he paid the plaintiff rent of $550 p.m. until March 31, 1979. When the agreement was about to expire the defendant entered into further negotiations with the plaintiff. He was told by the plaintiff that after the expiry of the agreement, if the defendant still wished to rent the said premises, he could do so at an increased rental of $800 p.m. and that both parties should enter into a fresh agreement for another six years. When he spoke to the plaintiff he spoke in Teochew dialect to him and the plaintiff never used the word "licence fee".

The defendant then signed the said agreement at the plaintiff's solicitors' office, (the terms of which are similar to the original agreement). He was asked by the plaintiff to go to the High Court to make a statutory declaration. He did not do so and instead went to consult his solicitor who advised that he need not sign it.

Since April, 1979, he had been sending $800 p.m. to the plaintiff who had refused to accept and had since stopped sending at the plaintiff's request. He had been advised by his solicitor that the said premises had a fixed rent which is $53.24 p.m. As such he was counter-claiming the amount paid to the plaintiff over this fixed rent and protection as a tenant under the Act.

The trial judge held that the said agreement was a tenancy agreement and dismissed the plaintiff's claim with costs and gave judgment for the defendant on his counterclaim for the sum of $26,424.40 and costs.

There are two grounds of appeal.

(1) That the trial judge erred in holding that oral evidence was admissible to vary the written contract between the parties;

(2) That the trial judge erred in holding that the said agreement created a tenancy and not a licence.

The trial judge relied on the case of *Seow Kim Koi* v. *Wei Yin Chen*,[1] in admitting the oral evidence of the defendant in the present case. This was an action by the plaintiff to recover from the defendant the sum of $9,230 under section 3(4) of the Control of Rent Ordinance stated to be excess rent paid by the plaintiff to the defendant over a period of 71 months at the rate of $130 p.m. The defendant, who was the chief tenant was paying a rent of "slightly more than $100 p.m." to his landlords. He had sublet the ground floor of the premises to the plaintiff at $230 p.m. but the agreement entered into between them, prepared by a solicitor, stipulated the rental for the subletting was $100 p.m. Choor Singh, J. held that the rental stipulated in the tenancy agreement, namely, $100 p.m., was a fictitious rent and was not intended to operate as the agreed rent but was inserted to create evidence for some other purpose, namely, to protect the defendant against eviction by his superior landlord. Choor Singh J. reviewed the authorities and he held that section 93 of the Evidence Ordinance (which is equivalent to section 92 of the Evidence Act (Cap. 5)) did not preclude a party from showing that the writing in question was not really the contract between the parties but was only a fictitious or colourable device to cloak something else and that oral evidence was admissible to show that what purported to be an agreement was only a sham and was not intended to be acted upon. I respectfully agree with Choor Singh J.

In my view the trial judge has not erred.

As the plaintiff chose not to give any evidence at the trial and relied solely on the purported licence agreement, the trial judge had only the undisputed evidence of the defendant. The undisputed evidence were these:

(1) The said premises are controlled premises;

(2) A purported licence agreement dated April 27, 1973, was entered into between the parties wherein the defendant was to pay to the plaintiff the sum of $400 p.m. for the use of the said premises for a period of six years from August 1, 1973, and a deposit of $4000 was paid.

(3) The defendant was made to affirm a statutory declaration dated April 10, 1973, affirming that the agreement would constitute a licence only and confer no tenancy upon him.

(4) The defendant in fact paid the plaintiff $550 p.m. for the premises.

(5) On the expiry of the agreement, the said agreement dated May 2, 1979, was entered into for a period of six years from April 1, 1979, to March 31, 1985, for the sum of $800 p.m.

(6) The defendant refused to affirm the statutory declaration on the second agreement.

(7) The defendant carried on his tailoring business on the ground floor of the said premises and resided with his family on the first floor of the said premises.

(8) The defendant had possession and full control of the said premises without interference from the plaintiff.

The trial judge in his Grounds of Judgment discussed the law on the matter and applied the law to the undisputed facts and the operative clauses in the said agreement and came to the conclusion that the said agreement was a tenancy agreement. In my view the trial judge has applied the correct law and has come to the right conclusion that it was a tenancy agreement and that the plaintiff had used the device of a licence agreement to put the label of a licence on it.

Sommerville L.J. in *Facchini* v. *Bryson*,[2] said (page 1389):

"If, looking at the operative clauses in the agreement, one comes to the conclusion that the rights of the occupier, to use a neutral word, are those of a lessee, the parties cannot turn it into a licence by saying at the end "this is deemed to be a licence"; nor can they, if the operative paragraphs show that it is merely a licence, say that it should be deemed to be a lease."

Lord Justice Denning (at page 1390) in the same case made this observation:–

"Their relationship is determined by the law and not by the label which they choose to put on it; *Commissioners of Customs & Excise* v. *Pools Finance* (1952) T.L.R. 797). It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven-I will not in these days say a coach and four-but an articulated vehicle."

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *J.B. Jeyaretnam; Wee Swee Teow & Co.*

MALAYSIAN REPORTS

JAYASANKARAN v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah L.P., Salleh Abas F.J. & Abdoolcader J.) December 6, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 6 of 1982)]

Criminal Law and Procedure – Appeal – Whether petition of appeal signed by solicitor acting on authority of appellant meets requirements of law – Criminal Procedure Code (F.M.S. Cap. 6), s. 307(iv).

In this case the appellant had been convicted for an offence under section 465 of the Penal Code and bound over for 1½ years. He appealed against the conviction. Both the appellant and his solicitor signed the notice of appeal but only the solicitor signed the petition of appeal. The learned Judge held that the appellant must himself sign the petition of appeal and he struck out the appeal on the ground of non-compliance with section 307(iv) of the Criminal Procedure Code. The appellant then applied for the following question to be referred to the Federal Court "Whether a petition of appeal signed by only the solicitor for the appellant acting on the authority of the appellant meets the requirements of section 307(iv) of the Criminal Procedure Code".

Held, the answer to the question must be in the affirmative. Section 307(i) of the Criminal Procedure Code which relates to the procedure for appeal provides for a dissatisfied party to prefer an appeal to the High Court by lodging a notice of appeal and subsection (iv) stipulates the time for the appellant to lodge with the subordinate court a petition of appeal. Neither provision signifies the signatory to the notice or the petition and neither provides for the appellant to do so "personally" or in person as some legislative enactments specifically prescribe. This therefore attracts the maxim *"qui facit per alium facit per se"* (he who does an act through another is deemed in law to do it himself).

Cases referred to:

(1) *Pitting bin Haji Mohd. Ali* v. *Public Prosecutor* [1979] 2 M.L.J. 136.
(2) *Toh Yew Sing & Ors.* v. *Public Prosecutor* [1980] 2 M.L.J. 215.

FEDERAL COURT.

R.R. Chelliah for the appellant.
Mokhtar bin Abdullah Deputy Public Prosecutor for the respondent.

Cuv. Adv. Vult.

Raja Azlan Shah L.P. (delivering the Judgment of the Court): The question for reference under section 66(1) of the Courts of Judicature Act 1964 is: